RETENTION OF GOODS AS WAIVER OF BREACH OF WARRANTY AS TO QUALITY.—Excluding from consideration any rules as to fraud or rights of rescission, there remains the question whether a buyer, after accepting goods in a defective condition, notwithstanding a right to reject them because of a breach of warranty, thereby waives his rights under the warranty and agrees that such performance received is in satisfaction of all obligations. A recent case affirms the doctrine that the buyer does not waive his rights under the warranty by the acceptance. *Jacot* v. *Grossman* (Va.), 78 S. E. 646.

To hold otherwise in cases for the sale of various products, especially perishable goods, would result in unnecessary loss to both parties even while attempting to preserve their rights. The numerous fine distinctions, however, that have been drawn in the adjudicated cases involving this question, have been productive of varying rules.

In the general law of contracts, in the absence of an express agreement, acceptance does not necessarily indicate full satisfaction as a matter of law;[1] and likewise in the law of sales, it is difficult to arrive at a different rule upon any sound reasoning. In some cases, nevertheless, the courts, in an effort to relieve of hard bargains, and in others, on account of illogical reasoning, have proceeded with little or no uniformity. The courts do hold, however, that when there is no waiver, the buyer may bring an action for the breach of warranty, or he may recoup his damages when an action is brought against him for the purchase price.[2]

When the contract provides for examination and notice of breach to the seller, it will of course govern, even though the terms of the contract be hard and unreasonable.[3] In the absence of such provision, the better view and that supported by the weight of authority and reason, gives the buyer the option either to reject the goods or to retain them and rely on the warranty as a ground of action or recoupment, without regard to whether the warranty be express or implied, or whether the defects be patent or latent, or the contract executed or executory.[4] This is the English rule.[5]

Acceptance, while it may raise a presumption of waiver, merely precludes the right to reject the goods and return them.[6] It may raise a presumption that the goods are as contracted for,[7] but it is

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[1] Phillips Construction Co. *v.* Seymour, 91 U. S. 646. CHITTY, CONTRACTS, 11 ed., 652.

[2] WILLISTON, SALES, 1000.

[3] Shaerer *v.* Gaar Scott Co., 41 Tex. Civ. App. 39, 90 S. W. 684; Case Threshing Machine Co. *v.* Lyons, 24 Ky. Law Rep. 1862, 72 S. W. 356.

[4] Eastern Ice Co. *v.* King, 86 Va. 97, 9 S. E. 506; Babcock *v.* Trice, 18 Ill. 420, 68 Am. Dec. 560; Best *v.* Flint, 58 Vt. 543, 5 Atl. 192; English *v.* Spokane Comm., 57 Fed. 451; Underwood *v.* Wolf, 131 Ill. 425, 23 N. E. 598; Weed *v.* Dyer, 53 Ark. 155, 13 S. W. 592.

[5] Thomson *v.* Southeastern Ry. Co., 9 Q. B. D. 320.

[6] Central Trust Co. *v.* Arctic Ice Co., 77 Md. 202, 26 Atl. 493; Huyett & Smith Co. *v.* Gray, 124 N. C. 322, 32 S. E. 718.

[7] Morse *v.* Moore, 83 Me. 473, 22 Atl. 362; Northwestern Cordage Co. *v.* Rice, 5 N. D. 432, 67 N. W. 298.

no more than a presumption of fact in each particular case.[8] In New York at least, executed and executory contracts are distinguished in this relation.[9] In that state also, in ruling upon this question, express and implied warranties are distinguished.[10] Such distinction seems inconsistent with the view that the question depends upon whether the contract is executed or executory, unless it can be said that there can be no express warranty in an executory contract.[11] It is settled that there may be such a warranty.[12]

The jurisdictions maintaining the minority views base their positions upon considerations of, the nature of the warranty, the difficulty of discovering defects, and whether the contract is executed or executory.

These courts, while differing from the broader and more just rule, concede that their rule does not apply in every case, but the exceptions made by them differ widely. The following rules have received sanction and each has been established in at least a few states:

I. Express warranty survives acceptance and excuses notice of defects and offer to return.[13]

II. Implied warranty survives only when defects are latent or there is no opportunity for inspection.[14]

III. Neither express nor implied warranty will survive if defects are obvious and there is opportunity for inspection.[15]

IV. If defects are latent and inspection would be useless, then the warranty will survive whether express or implied.[16]

In the recent case of *Jacot* v. *Grossman* (Va.), 78 S. E. 646, the sale was of a quantity of seed by sample. It is settled that in sales by sample there is an implied warranty that the bulk shall be like the sample.[17] Such a warranty in some states always survives acceptance, it being considered an express rather than an implied warranty.[18] This case was correctly decided both according

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[8] Northwestern Cordage Co. *v.* Rice, *supra.*

[9] Gaylord *v.* Allen, 53 N. Y. 515; Rust *v.* Eckler, 41 N. Y. 488.

[10] Dounce *v.* Dow, 64 N. Y. 411; Staiger *v.* Soht, 191 N. Y. 527, 84 N. E. 1120.

[11] WILLISTON, SALES, 856.

[12] Eagle Iron Works *v.* Railway Co., 101 Iowa 289, 70 N. W. 193.

[13] Smith *v.* Mayer, 3 Colo. 207; Hooper *v.* Story, 155 N. Y. 171, 49 N. E. 773; Meyer *v.* Wheeler, 65 Iowa 390, 21 N. W. 692; Brigg *v.* Hilton, 99 N. Y. 517, 3 N. E. 51; 2 MECHEM, SALES, § 1395.

[14] Moultrie Repair Co. *v.* Hill, 120 Ga. 730, 48 S. E. 143; Brown *v.* Burnhaus, 4 Hun. (N. Y.) 227; McClure *v.* Jefferson, 85 Wis. 208, 54 N. W. 777; Miller *v.* Moore, 83 Ga. 684, 10 S. E. 360; Studer *v.* Bleistein, 115 N. Y. 316, 22 N. E. 243.

[15] Munford *v.* Kevil, 109 Ky. 246, 58 S. W. 703; Jones *v.* McEwan, 91 Ky. 373, 16 S. W. 81.

[16] Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 921.

[17] Pontiac Shoe Co. *v.* Hamilton, 18 Tex. Civ. App. 283, 44 S. W. 405.

[18] Brigg *v.* Hilton, *supra.*

to the better rule and also under rule IV *supra*. It is doubtful if any court would hold that, in a case where inspection is useless, as in this case (i. e., sale of seed, where inferior quality cannot be discovered until they fail to germinate), acceptance and retention waived the breach of the warranty. Such cases have been repeatedly decided as exceptions in jurisdictions where the minority views prevail.[19]

[19] Shaw *v.* Smith, 45 Kans. 334, 25 Pac. 886; Van Wyck *v.* Allen, 69 N. Y. 61, 25 Am. Rep. 136.